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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 5

RAPHAEL KONIGSBERG,

Petitioner,

vs.

THE STATE BAR OF CALIFORNIA and the COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA,

Respondents.

PETITION FOR REHEARING.

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The action of this court in *Konigsberg v. State Bar* vitally affects the admissions procedures in use throughout the country. The precedent established goes far beyond the facts of the present case and can so thoroughly destroy effective administration of the standards for admission to the Bar that petitioners feel it is imperative for a rehearing to be granted.[1]

[1]Numerous Bar Associations throughout the country have expressed their serious concern with the effect that this court's opinion will have on their own admission practices and respondents submit that these groups should be given the opportunity to file *amicus curiae* briefs since this decision so vitally affects their practice.

I.

This Court Should Not and Cannot Deny the Right to Draw Adverse Inferences From Failure to Answer Material and Relevant Questions.

It is an elementary principle of jurisprudence that adverse inferences can be drawn from the failure of a person in possession of relevant evidence to produce such evidence.

2 Wigmore on Evidence (3rd Ed., 1940), Sec. 285;

Calif. Code Civ. Proc., Sec. 1963, Subds. 5 and 6;

Bone v. Hayes (1908), 154 Cal. 759;

Freitas v. Peerless Stages, Inc. (1952), 108 Cal. App. 2d 749;

Talbert v. Ostergaard (1954), 129 Cal. App. 2d 222.

Not only has California consistently followed this rule, but this court has sustained it even in situations where the party has the constitutional privilege not to answer.

Adamson v. California (1946), 332 U. S. 46, 91 L. Ed. 1903.

It is therefore incredible that this court could have meant or intended to state here that:

". . . Obviously the State could not draw unfavorable inferences as to his truthfulness, candor or his moral character in general if his refusal to answer was based on a belief that the United States Constitution prohibited the type of inquiries which the Committee was making. On the record before us, it is our judgment that the inferences of bad moral character which the Committee attempted to draw from Konigsberg's refusal to answer questions

about his political affiliations and opinions are unwarranted."

Konigsberg v. State Bar of Calif. (1957), ... U. S. ....., C. C. H., U. S. S. Ct. Bull. pp. 1033, 1050.

Petitioners respectfully submit that it is certainly not obvious that such an inference cannot be drawn, and that, on the contrary, there is no legal basis on which this court can deny petitioners the right to draw this inference. Whatever might be the court's present attitude in a case where the witness has a constitutional privilege not to answer, where there is no such privilege there is no basis for denying petitioner the right to follow the rules of evidence long existing in California.

The precedent established by a contrary decision would effectively destroy the admission procedure in use throughout the country.

Mr. Konigsberg, though asking for affirmative action, and having the burden of going forward with proof that he was entitled thereto, claimed a constitutional privilege not to answer any questions which he determined related to his associations or to his political beliefs. This included all questions regarding past or present membership in the Communist Party and necessarily prevented further inquiry into the illegal activities in which he may have participated as a member of the Party. [R. 29, 31, 71, *et seq.*, 109, 118.]

Petitioners' questions were not, as might be implied from the decision of this court, idle inquiries into Mr. Konigsberg's political philosophies and beliefs. The full Committee hearing was held in March, 1954. Petitioners would have been remiss in their duties to have ignored the events of the months and years immediately preceding

the hearing. They would have been woefully blind to have ignored the legislative and judicial findings that the Party advocated the violent overthrow of the government and that large numbers of its members were engaged in criminal activities to accomplish this end. Even assuming that, despite the reputation of the Communist Party, there were members as late as March, 1954, who did not advocate the violent overthrow of the government, did not participate in the illegal activities of the Party, and were otherwise persons of good moral character, it was the right and the duty of those entrusted with the task of passing upon fitness for admission to the California Bar to inquire into membership. If an applicant admitted membership, it would then be the Committee's duty to determine whether such membership was innocent or of a nature which disqualified him from admission to the Bar.

It may have been the intention of this court to pass only on the single factual situation before it and to merely prevent denial of admission to an applicant because of Communist Party activity which the record does not show included criminal acts. For the reasons previously stated, we disagree with such action and condemn it not only as unwise but as beyond the powers of this court. But, of even greater importance is the precedent which this decision necessarily establishes. The already difficult job of protecting the standards of the Bar by denying admission to unqualified applicants will be made infinitely more difficult. However unwise this court's decision may be in the Communist field, it was in no way restricted to questions concerning the Communist Party.

In the future any applicant may appear, present letters of recommendation from his friends and associates, state that he is a fine person qualified for admission and refuse to answer any further questions on the ground that they

infringe his freedom of speech under the United States Constitution. Regardless of whether such a privilege exists or even whether it was claimed in good faith, no adverse inferences can be drawn by the Committee,[2] and, unless the Committee of Bar Examiners can produce extensive affirmative evidence that the applicant is unqualified, he must be admitted.

It has long been the practice of the California Bar Examiners (and of their counterparts in every other state) to place their primary reliance on the information obtained from the examination and cross-examination of the applicant. Such reliance is a practical necessity. The California Committee of Bar Examiners works on a limited budget. Each year hundreds of applications are received and examined. In the past, approximately 70 cases a year have required serious investigation and actual consideration by the Committee. This number can be expected to increase under this court's decision. Even if the Bar Examiners had an unlimited staff of investigators, which they do not, they could not in the short time available gather sufficient evidence to justify any decision granting or denying admission, were they denied the right to require an applicant's full cooperation. In an occasional case, an applicant's past and present record of convictions for criminal activities will be so well known and immediately available that cooperation by the applicant might not be necessary in passing upon his eligibility for admission. However, where there is no such record im-

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[2]The opinion of this court assumes that Mr. Konigsberg claimed the privilege in good faith. However, there is little in the record or in past decisions of this court to support such an inference. Certainly the future applicant in the light of the present decision will have no difficulty in claiming broad constitutional privileges with an equal appearance of good faith.

mediately available, and the applicant fails to cooperate with the Committee by refusing to answer its material questions, the Committee could not produce (and should not be required to produce) the necessary evidence on which to base a proper determination of an applicant's fitness in the short time available. Unless the burden of proving material facts peculiarly within the applicant's knowledge remains on the applicant, it would be impossible for the Committee of Bar Examiners, or similar bodies, to carry out its duty of determining whether each of the many hundreds of applicants were qualified under the applicable state statutes. They would have no reasonable basis for their decision whether this decision was to grant or to deny admission.

We therefore urge this court to exercise its powers to grant rehearing for further consideration of the crucial questions before it.

II.

Failure to Grant a Rehearing Leaves Important Issues Unsettled and Will Necessarily Require Further Litigation Before Mr. Konigsberg's Right to Be Admitted to the California Bar Can Be Determined.

The action of the Committee of Bar Examiners in refusing to admit Mr. Konigsberg was based upon all of the evidence before it including the affirmative evidence indicating unfitness and the effect of the applicant's failure to answer relevant and material questions.

The majority of this court has isolated the possibility of admission being denied solely on the grounds that the applicant failed to answer from the other issues. For the reasons set forth by Justices Harlan and Clark this appears to us to be a completely artificial and unwarranted

fragmentation of a single issue. However, if such fragmentation is made, this issue must nevertheless be decided before Mr. Konigsberg's right to admission can be determined. The decision of the Committee with respect to Mr. Konigsberg was based on all factors before it, but there can be no doubt from the record that the applicant's refusal to answer relevant and material questions was in itself sufficient to require that admission be denied.

The Committee warned Mr. Konigsberg that he owed a duty of complete candor and that a lack of such candor made it extremely difficult for the Committee and could result in the refusal to certify.

". . . The only way I can find out and aid this Committee in finding out about your character is to ask you these questions, not what someone else thinks about you, your reputation. That is the reason I have asked the question. Could you give us a categorical answer? A. I can only give you the answer I have given you, and I would be very happy to answer that under other circumstances." [R. 31.]

". . . you are seeking admission to the profession and that we as your prospective colleagues have a right to *expect complete candor from you* on this particular question, and that if you don't wish to be completely candid with us then we are justified in saying you don't belong in our profession." [R. 34.]

". . . I think we stated our position the last time that we are interested in knowing whether or not Mr. Konigsberg has any present affiliations with the Communist party and whether or not he had any affiliations in the past; if he did have those affiliations whether they still continued in any respect." [R. 71.]

". . . The thing that troubles me is we have an affirmative duty under the statute to certify as to this applicant's good moral character. We have endeavored to point out to him that the burden of showing that character is upon him. It appeared to me that he wasn't being quite forthright with us in not giving us an answer to those questions . . ." [R. 76.]

"He is making it extremely hard for the Committee." [R. 81.]

In past cases admission has been denied on this ground alone.

". . . On a few occasions applicants have refused to answer certain pertinent questions and the Committee has rejected their applications for such reason. The Supreme Court in effect has upheld the Committee in such a case by refusing to consider it. *Cross v. Committee of Bar Examiners,* S. F. Nos. 18252, 18641 and 18922. Certiorari and mandamus denied. U. S. Supreme Court, Misc. 534 Oct. 1950 and Misc. 506 Oct. 1952." (457.)

". . . . Sometimes the person under investigation invokes the privilege against self-incrimination. The Committee has declined to certify such persons for admission on the ground such refusal forecloses the Committee from effectively pursuing a legitimate and necessary line of inquiry. The California Supreme Court has recently denied a petition for writ of review in such a case. *Brooks v. Committee of Bar Examiners,* L. A. No. 23067, October 6, 1954." (466.)

"Character Investigation of Applicants for Admission," Goscoe O. Farley, Secretary, Committee of Bar Examiners (1954), 29 S. Bar Journal 454, 457, 466.

The right of the Committee to require the applicant to present relevant information, to cross-examine, and to test the truth of and weight to be given to his affirmative evidence is essential to the proper administration of the State Bar Act. On remand the Committee must therefore continue to take the position (in the absence of further guidance from this court) that refusal to answer relevant and material injuiries necessary to a full consideration of an applicant's qualifications is, in itself, sufficient ground upon which a denial of admission can be made.

Petitioners therefore respectfully request that since this court has assumed jurisdiction of this case, it recognize that this is one of the issues properly before it. In view of its great importance to the applicant and to the Committee, a rehearing should be granted and the opportunity afforded to Mr. Konigsberg and to petitioner to brief and argue this issue.

Respectfully submitted,

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